

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-7544

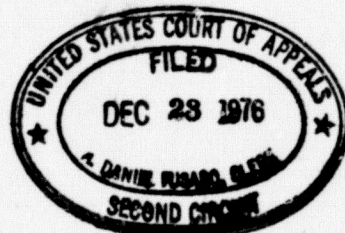
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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RICHARD S. KAYE,	:	APPEAL FROM THE UNITED
	:	STATES DISTRICT COURT
Plaintiff-Appellant,	:	FOR THE SOUTHERN
	:	DISTRICT OF NEW YORK
-against-	:	
FUNDING SYSTEMS CORPORATION,	:	
	:	
Defendant-Appellee,	:	Docket No.
	:	<u>76-7544</u>
-and-	:	
EQUIMARK CORPORATION,	:	
	:	
Defendant.	:	

B  
P/S

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JOINT APPENDIX

JOHN M. BURNS, III  
Attorney for Plaintiff-  
Appellant  
200 East 42nd Street  
New York, New York 10017

WEBSTER & SHEFFIELD  
Attorneys for Defendant-  
Appellee  
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N O T E

THIS APPENDIX SUPPLEMENTS  
VOLUMES I THROUGH III OF  
THE JOINT APPENDIX FOR  
DOCKET NO. 76-7272

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RICHARD S. KAYE V. FUNDING SYSTEMS CORP.

301 CIV. 5628

DATE	PROCEEDINGS	
Dec-20-74	Filed complaint - issued summons.	
Dec-20-74	Filed affdvt. and order appointing process server.	
Dec-23-74	Filed plaintiff's exhibits, affdvt. and ORDER TO SHOW CAUSE for a preliminary injunction - ret. 12-26-74 at 9:30 A.M.; service by 12-23-74 before noon. -- Carter, J.	
Dec-23-74	Filed plaintiff's memorandum in support of motion for preliminary injunction.	
Dec-26-74	Filed memo endorsed on O.S.C. filed on 12-23-74: Motion to enjoin the holding of Dec-27-74 Stockholders meeting of Funding Systems Corp. is granted and T.R.O. issued to that effect. So ordered. Carter, J. m.n.	
Dec-26-74	Filed deft. Funding Systems Corp.'s affdvt. of William M. Holls in opposition to pltf's motion.	
Dec-26-74	Filed deft. Equimark Corp.'s affdvt. of Donald C. Bush in opposition to plaintiff's motion.	
Dec-26-74	Filed deft. Equimark Corp.'s memorandum of law in opposition to pltf's motion.	
Dec-26-74	Filed deft. Funding Systems Corp.'s memorandum in opposition to pltf's motion.	
Dec-26-74	Filed deft. Funding Systems Corp.'s notice of appeal to the USCA for the 2nd Circuit from memo and order of 12-26-74 -- copy mailed. (appeal submitted today without notice to docket clerk)	
Dec-27-74	Filed copy of O.S.C. for preliminary injunction and pltf's memorandum in support with Marshals return of service - served U.S. Corporation Co. registered agent for Funding Systems Corp. by Kiernan on 12-23-74	
Dec-27-74	Filed summons and Marshals return - served U.S. Corporation Co. registered Agent for Funding Systems Corp. by Mr. Riernan on 12-23-74.	
Dec-31-74	Filed true copy of USCA order that the order of District Court (memo endorsed of 12-26-74) is reversed with costs taxed against the appellee (no bill of costs or statement attached) m/n	
01-15-75	Filed ANSWER of defendant Funding Systems Corp.	WSP&P
01-22-75	Filed ANSWER of deft. Equimark Corp.	R&M
02-02-75	PRE-TRIAL CONFERENCE HELD BY Mag. <i>W. H. H. H.</i>	
02-19-75	Filed deft. Equimark Systems Corp.'s affdvt. and notice of motion for summary judgment. - ret. 2-28-75	
02-19-75	Filed deft. Equimark's memorandum in support of motion for summary judgment.	
02-28-75	Filed Transcript of record of proceedings, dated Dec 26-74	
02-28-75	Filed stip. and order adj. Equimark's motion for summary judgment to 3-7-75 and that pltf. shall serve his answering papers 12 noon on 3-4-75 -- Carter, J.	
02-28-75	Filed stip. and order permitting pltf. to file amended complaint and deft. Equimark's motion for summary judgment shall apply to the amended complaint and service of amended complaint shall not postpone said motion or pltf's time to serve answering papers. Equimark's answer to amended complaint shall be served within 20 days after service. -- Carter, J.	
03-05-75	Filed plaintiff's Statement under Rule 9(g)	
03-05-75	Filed plaintiff's memorandum in opposition to mot. of deft. Equimark for summary judgment.	
03-07-75	Filed stip. and order that Equimark is to file Rule 9(g) statement by 3-11-75 and pltf. file a further Rule 9(g) statement by 3-18-75 and adj. Equimark's motion for summary judgment to 3-21-75 - Carter, J.	
03-05-75	Filed pltf's notice to take depositions of persons and on dates listed herein.	
03-05-75	Filed pltf's notice of appearance by Attorney for plaintiff.	AK&I
03-10-75	Filed Transcript of record of proceedings, dated Dec 26-74	
	SA-(111)	



DATE	PROCEEDINGS
03-11-75	Filed deft. Equimark Corp.'s statement under Rule 9(g)
03-20-75	Filed deft. Equimark Corp's reply memorandum in support of motion for summary judgment.
03-17-75	Filed ANSWER of deft. Funding Systems Corp. WSEHAP
04-03-75	Filed stip. and order ext. deft. Equimark's time to answer to pltf's request for production to 4-23-75; the deposition of deft. Equimark is adj. to 4-24-75; Equimark reserves the right to move for protective order; the deposition of Board of Governors is adj. to 4-28-75; the deposition of Price Waterhouse is adj. to 4-7-75 -- Carter, J.
04-03-75	Filed stip. and order ext. deft. Funding's time to object or answer pltf's request for production to 4-18-75; deposition of Funding are adj. to 4-21-75; Deft. reserves the right to move for a protective order; -- Carter, J.
04-25-75	Filed stip. and order ext. deft. Funding Systems Corp.'s time to answer to pltf's request for production to 5-16-75, deft. Equimark Corp.'s time to answer to pltf's request for production is ext. to 5-21-75; deposition of Funding Systems Corp. is adj. to 5-18-75; deposition of Equimark is adj. to 5-22-75, etc. -- Carter, J.
05-20-75	Filed AMENDED COMPLAINT.
05-30-75	Filed stip. and order that deft. Funding Systems time to answer pltf's request for production is ext. to 6-16-75; deft. Equimark's time to respond to pltf's request for production is ext. to 6-18-75; deposition of Funding System is adj. to 6-18-75; deposition of Equimark is adj. to 6-23-75; both defendants time to move for a protective order with respect to depositions and production is reserved; deposition of the Board of Governors of the Fed. Res. System is adj. to 6-30-75; the deposition of Price Waterhouse & Co. is adj. to 7-1-75 -- Carter, J.
06-19-75	Filed stip. and order that the time of deft. Funding Systems to answer pltf's request for prod. of documents is ext. to July 16, 1975; time of deft. Equimark Corp. to answer pltf's request for prod. of documents is ext. to July 21, 1975; etc. as indicated So ordered, Carter, J. (final ext.)
07-17-75	Filed stip. and order ext. time for deft. Funding Systems Corp. to respond to pltf's request for production to 9-18-75; deft. Equimark Corp.'s time to respond to pltf's request for production is ext. to 9-23-75; deposition of Equimark is adj. to 9-26-75; Funding Systems and Equimark reserve the right to move for protective order; deposition of Board of Governors of the Fed. Reserve System is adj. to 10-2-75 and the deposition of Price Waterhouse & Co. is adj. to 10-2-75 -- Carter, J. FINAL EXTENSION.
1-12-76	Filed Pltff's Notice of Motion for an order directing deft. Equimark Corp to permit pltff to inspect....etc....ret. 1-23-76...at 10A Rm 1106.
1-12-76	Filed Pltff's Memo of Law in support of motion to inspect.
09-17-75	<i>Pre trial Conference Held by Mag. Ganttel.</i>
1-22-76	Filed Deft Equimark affdvt in opposition to pltff's motion to compel production & Discov.
1-22-76	Filed " " Memo of Lawin " " " " " " " " " " " "
1-23-76	Filed Pltff's Reply Affdvt by J. M. Burns III in support of its motion for discovery.
1-30-76	Filed Memo End on bk of motion fld 1-12-76...Motion is denied.....So Ordered.....Carter, J. mn
4-6-76	Filed Deft. Equimark Corp's Notice of Motion to dismiss complt pur to 12(h)(3) .....ret 4-16-76 at 10AM.
4-6-76	Filed Deft. Equimark's Memo of Law in support of its motion to dismiss amended complt.
4-14-76	Filed Pltff's Affdvt by J. M. Burns III in opposition to deft Equimark's motion to dismiss.
4-14-76	Filed Pltff's Memo in opposition to deft's motion to dismiss.
4-15-76	Filed Defts' Reply affdvt by. A. C. Freeman, in support of its motion to dismiss.
5-10-76	Filed Opinion #14372...Deft Equimark Corp has moved, pur to Rule 12(h)(3) FRCP., to dismiss pltff's amended complt on the ground that this court lacks subject matter jurisdiction over the claims alleged therein. The motion is granted....So Ordered.....Carter, J. mn





ANSWER OF DEFENDANT FUNDING SYSTEMS  
CORPORATION TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
RICHARD S. KAYE,

Plaintiff,

-against-

FUNDING SYSTEMS CORPORATION and  
EQUIMARK CORPORATION,

Defendants.  
-----X

: ANSWER TO AMENDED  
: COMPLAINT

: 74 Civ. 5628 (RLC)

Defendant Funding Systems Corporation, by its  
attorneys, Webster Sheffield Fleischmann Hitchcock & Brookfield,  
for its answer to the amended complaint herein:

1. Denies each and every allegation contained in  
paragraphs 5, 8, 9, 10, 17, 18, 25, 27, 28 and 31.

2. Denies knowledge or information sufficient to  
form a belief as to the truth of the allegations contained in  
paragraph 7, and denies on information and belief the allega-  
tions contained in paragraph 11.

3. Answering paragraph 2, denies knowledge or infor-  
mation sufficient to form a belief as to plaintiff's residence  
and citizenship.

4. Denies each and every allegation in paragraph 3,

except admits on information and belief that defendant Equimark Corporation is a registered bank holding company incorporated under the laws of the Commonwealth of Pennsylvania with its principal office in Pittsburgh, Pennsylvania, and admits that it is the owner of record and on information and belief beneficially of 580,575 shares of common stock of Funding Systems Corporation, constituting approximately 54% of the outstanding shares of said stock.

5. Answering paragraph 12, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except admits on information and belief that on or about April 5, 1975, Equimark Corporation filed an application with the Board of Governors of the Federal Reserve System and that on or about November 21, 1974 Equimark requested the withdrawal of its application.

6. Denies each and every allegation contained in paragraph 13, except admits that on or about September 5, 1974, Marshall E. Gerson, the former chief executive officer of Funding Systems Corporation commenced an action against Funding Systems Corporation and Equimark Corporation, that he subsequently removed the action to the District Court for the Southern District of New York, and that he filed an amended complaint therein, a copy of which is annexed to plaintiff's



complaint, to which the Court is respectfully referred for the allegations therein.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 14 and 15, except admits on information and belief that in or about April 1974 Equimark distributed a tender offer circular to shareholders of Funding Systems Corporation and respectfully refers the Court to said offering circular for the terms thereof.

8. Denies each and every allegation contained in paragraph 16, except admits that a prospectus dated March 15, 1972, pursuant to which Funding Systems Corporation made a public offering of 315,000 shares of stock, stated that the company would furnish its stockholders with annual reports containing certified financial statements and quarterly unaudited financial information.

9. Denies each and every allegation contained in paragraph 19, except admits that the leasing operations of Funding Systems Corporation sustained a loss of approximately \$2,035,000 during the nine-month period ended September 13, 1974, and made a profit of approximately \$27,000 for the nine-month period ended September 30, 1973.

10. Denies each and every allegation contained in paragraphs 21, 22, 23, and 24, except admits that defendant mailed to its shareholders the proxy statement annexed as Exhibit 2 to the complaint, and respectfully refers the Court thereto for the terms of the resolutions proposed by plaintiff, management's recommendations, and the information disclosed by said proxy statement.

11. Denies each and every allegation contained in paragraph 26, except admits that plaintiff instituted the present action and on December 26, 1974 obtained an order of this Court, which order was reversed by order of the Court of Appeals for the Second Circuit, to which the Court is respectfully referred for the terms thereof.

12. Denies each and every allegation contained in paragraph 29, except admits that shares voted by Equimark were counted and were voted against plaintiff's proposals, which were defeated; and that said shares were voted in favor of the nominees to the Board of Directors listed in the proxy statement annexed as Exhibit 2 to the amended complaint, and that those nominees were elected.

13. Denies each and every allegation contained in paragraph 30, except admits that a member of the firm of



Price Waterhouse & Company, independent certified public accountants, was present at the annual meeting held on December 27, 1974, and answered fully all questions which may properly have been asked of him.

AFFIRMATIVE DEFENSE

14. Plaintiff fails to state a claim upon which relief can be granted.

WHEREFORE, defendant Funding Systems Corporation demands judgment dismissing the complaint and awarding it the costs and disbursements of this action.

Dated: New York, New York  
March 17, 1975

WEBSTER SHEFFIELD FLEISCHMANN  
HITCHCOCK & BROOKFIELD

By /s/ ROGER L. WALDMAN  
(A Member of the Firm)  
Attorneys for Defendant  
Funding Systems Corporation  
One Rockefeller Plaza  
New York, New York 10020  
(212) 582-3370

NOTICE OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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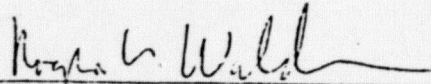
RICHARD S. KAYE,	:	
Plaintiff,	:	74 Civ. 5628 (RLC)
-against-	:	<u>NOTICE OF MOTION</u>
FUNDING SYSTEMS CORPORATION	:	
and EQUIMARK CORPORATION,	:	
Defendants.	:	
	:	

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PLEASE TAKE NOTICE that upon the affidavit of Roger L. Waldman, Esquire, sworn to May 24, 1976, and upon all pleadings and proceedings heretofore had herein, the undersigned, attorneys for defendant Funding Systems Corporation, will move this Court before The Honorable Robert L. Carter, United States District Judge, at the United States Courthouse, Foley Square, Room 318, on June 11, 1976 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an Order, pursuant to Rules 12(h)3 and 56 of the Federal Rules of Civil Procedure, dismissing the action on the ground that plaintiff's claim is moot, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York  
May 24, 1976





(A Member of the Firm)  
WEBSTER & SHEFFIELD  
Attorneys for Defendant  
Funding Systems Corporation  
One Rockefeller Plaza  
New York, New York 10020  
(212) 582-3370

TO:

JOHN M. BURNS, III, ESQUIRE  
Alexander, Katz & Rosenberg  
Attorney for Plaintiff  
200 East 42nd Street  
New York, New York 10017

REAVIS & McGRATH  
1 Chase Manhattan Plaza  
New York, New York 10005

AFFIDAVIT OF ROGER L. WALDMAN IN SUPPORT  
OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
RICHARD S. KAYE, :  
 :  
 Plaintiff, : 74 Civ. 5628 (RLC)  
 :  
 -against- :  
 : AFFIDAVIT  
 FUNDING SYSTEMS CORPORATION :  
 and EQUIMARK CORPORATION, :  
 :  
 Defendants. :  
 :  
 -----X

STATE OF NEW YORK )  
 ) ss.:  
 COUNTY OF NEW YORK )

ROGER L. WALDMAN, being duly sworn, deposes and  
says:

1. I am a member of the firm of Webster & Sheffield,  
attorneys for defendant Funding Systems Corporation ("FSC"). I  
submit this affidavit in support of FSC's motion, pursuant to  
Rules 12(h)3 and 56 of the Federal Rules of Civil Procedure, for  
an order dismissing the complaint against it on the grounds of  
mootness.

2. This action is a suit under Section 14 of the  
Securities and Exchange Act of 1934. Plaintiff, a shareholder of  
FSC, claims that a 1974 proxy statement sent to FSC shareholders  
in connection with FSC's 1974 annual meeting omitted to disclose  
information material within the meaning of SEC Rule 14(a)9. In  
his original complaint, filed just prior to the 1974 meeting,  
plaintiff sought an injunction restraining the holding of the



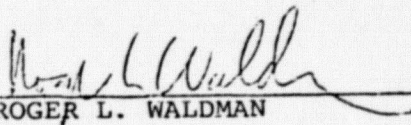
meeting until the allegedly material information had been furnished to shareholders. After the requested injunction had been denied and the meeting held, plaintiff filed an amended complaint in which he prays for a judgment declaring the 1974 meeting "null and void" and ordering the prompt rescheduling of the meeting, after the allegedly material information has been furnished to shareholders.

3. Events since the 1974 meeting have rendered plaintiff's suit moot. Only three items of business were acted upon at the 1974 meeting: (1) the appointment of auditors, (2) the election of directors, and (3) the consideration of three shareholders resolutions submitted by plaintiff. As to the first item, the directors elected have long since completed their term and been replaced by new directors elected at FSC's 1975 and 1976 annual meetings. Similarly, the auditors selected at the 1974 meeting have long since completed their audit and new shareholder action taken appointing different auditors at the 1975 and 1976 annual meetings. As to the third item, plaintiff's proposals, they were resubmitted to the 1975 annual meeting, were defeated, and were not even submitted by plaintiff for consideration at the 1976 meeting.

4. In view of these events, rerunning the 1974 meeting as prayed for by plaintiff would serve no purpose. It would be useless to elect auditors and directors for a term which has expired, and it would be equally useless to act on resolutions which were rejected by FSC's shareholders at a subsequent annual meeting.

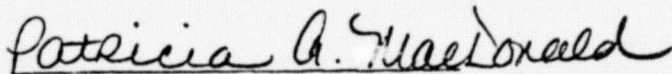
5. The Court has already dismissed as moot the other claim asserted in plaintiff's complaint, a claim asserted against Equimark Corporation. It is respectfully submitted that the claim against FSC should similarly be dismissed, clearing the Court's calendar of this totally moot litigation.

WHEREFORE, deponent asks that the complaint against Funding Systems Corporation be dismissed.

  
\_\_\_\_\_  
ROGER L. WALDMAN

Sworn to before me this

24<sup>th</sup> day of May, 1976.



PATRICIA A. MACDONALD  
Notary Public, State of New York  
No. 41-2440000  
Qualified in Queens County  
Certificate filed in New York County  
Commission Expires March 30, 1977



AFFIDAVIT OF JOHN M. BURNS, III IN OPPOSITION  
TO MOTION TO DISMISS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- -x

RICHARD S. KAYE,

:

Plaintiff,

:

74 Civ. 5628 (RLC)

--against--

:

FUNDING SYSTEMS CORPORATION  
and EQUIMARK CORPORATION,

:

AFFIDAVIT IN OPPOSITION  
TO MOTION TO DISMISS

:

Defendants.

:

----- -x

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK )

JOHN M. BURNS, III, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this Court; I am a member of Alexander, Katz & Rosenberg, the attorneys for plaintiff herein; and I submit this affidavit in opposition to the motion of defendant Funding Systems Corporation ("FSC") for an order dismissing the complaint on the grounds of mootness.

2. Contrary to the assertions submitted on behalf of FSC, this action is not solely one for an injunction restraining FSC from holding an annual meeting until certain material information has been disclosed to the shareholders. The amended complaint a copy of which is annexed hereto (but significantly not annexed to FSC's moving papers) specifically requests

"a final judgment, \* \* \* ordering FSC to promptly disclose to its shareholders all material facts relating to the business affairs of FSC as referred to in paragraph '24' hereof and to make such disclosure in the future as is required by §14 prior to each and all meetings of shareholders of FSC \* \* \*."

Paragraph "24" of the amended complaint alleges that the Proxy Statement issued by FSC in connection with its annual meeting of December 27, 1974 failed to disclose:

(a) information about the unlawfulness of the acquisition in 1971 of a majority of the voting stock of FSC by defendant Equimark Corporation ("Equimark");

(b) substantial abuses of Equimark's control over the business affairs of FSC;

(c) the determination by the Federal Reserve Board that Equimark's acquisition of this stock was unlawful;

(d) facts relating to an action brought against FSC by its former chief executive officer, Marshall E. Gerson;

(e) facts relating to Equimark's determination to discontinue its ownership of FSC stock while representing to the shareholders that it had no such plans; and

(f) facts relating to the adverse financial consequences to FSC should Equimark discontinue its ownership of stock of FSC.

3. The question of whether these disclosures should be made is still at issue before this Court, and it has not been mooted, by the fact that FSC has continued to hold annual meetings



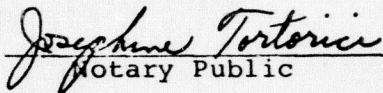
4. Moreover, plaintiff promptly moved for a preliminary injunction enjoining the December 27, 1974 FSC annual meeting, and this Court granted that motion. That motion was reversed by the Court of Appeals for this Circuit on the grounds that plaintiff had not shown irreparable injury. The Court of Appeals could only have meant that upon a proper showing, which plaintiff is certainly entitled to make, this Court could declare the wrongfully induced annual meeting of FSC to be null and void and could require the holding of another meeting. In this context, it is important to note that plaintiff promptly noticed depositions of parties and non-parties and promptly demanded the production of documents, all by notice served on February 28, 1975. The docket will show, however, that defendants' repeated delaying tactics enabled defendants to avoid producing anyone for deposition, other than Robert J. Kastelic, an officer of Equimark whom plaintiff predicted would be useless for discovery purposes, and who proved to be uninformed, and defendants avoided producing all but a minuscule quantity of the documents requested (see annexed copy of notice of depositions and request for production and inspection of documents and things dated February 28, 1975).

5. Additionally, although this Court has dismissed the complaint as to Equimark on the ground that Equimark has disposed of its controlling interest in FSC, and therefore the claims seeking to neutralize Equimark's exercise of such control are mooted, plaintiff has duly filed a notice of appeal and this issue will be subject to review by the Court of Appeals for this Circuit in September. Until such final determination, it may be advisable to defer FSC's present motion. In any event, the single issue of Equimark's control of FSC stock has nothing to do with the major claim of the complaint to require full disclosure of material facts, and this certainly is not in any way mooted or claimed to be mooted.

6. Therefore, in the interest of affording a plaintiff who seeks only the prophylactic relief of requiring a public corporation of which he is a shareholder to make full disclosure of material facts, it is highly desirable that the relief requested on this motion be, in all respects, denied.

  
JOHN M. BURNS, III

Sworn to before me this  
8th day of June, 1976.

  
Josephine Tortorici  
Notary Public

JOSEPHINE TORTORICI  
Notary Public, State of New York  
My Comm. Expires 12/31/77  
I am authorized to perform  
Notary Public duties in the County of  
Columbia, New York  
Commission Expires 12/31/77



AMENDED COMPLAINT  
(EXHIBIT TO BURNS AFFIDAVIT)

THE AMENDED COMPLAINT, TOGETHER  
WITH ALL EXHIBITS THERETO, APPEARS  
AT PAGE A-215 OF THE APPENDIX.

NOTICE OF DEPOSITIONS AND OF  
REQUEST FOR PRODUCTION AND  
INSPECTION OF DOCUMENTS AND THINGS  
(EXHIBIT TO BURNS AFFIDAVIT)

THE NOTICE OF DEPOSITION AND REQUEST  
FOR PRODUCTION AND INSPECTION OF  
DOCUMENTS AND THINGS APPEARS AT  
PAGE A-233 OF THE APPENDIX.



ENDORSEMENT ORDER OF JUDGE ROBERT L.  
CARTER, DATED SEPTEMBER 28, 1976

RICHARD S. KAYE v. FUNDING SYSTEMS CORP. and  
EQUIMARK CORP.

74 Civ. 5628

ENDORSEMENT

Plaintiff, a shareholder of Funding Systems Corporation (FSC), brought this action under §14 of the Securities and Exchange Act of 1934, (15 U.S.C. §78n) claiming that a 1974 proxy statement sent to FSC's shareholders in connection with FSC's 1974 annual meeting failed to disclose information material within the meaning of SEC Rule 14a-9 (17 C.F.R. §240.14a-9). In his initial complaint, plaintiff sought to enjoin the holding of this meeting until the allegedly material information had been furnished to shareholders; this injunction was denied.

Plaintiff's amended complaint sought

- (1) a declaration that FSC's 1974 meeting was null and void and an order rescheduling the holding of that meeting;
- (2) alternatively, an order requiring the prompt rescheduling and holding of a new meeting;
- (3) an order requiring prompt disclosure of all material facts relating to the business affairs of FSC and making such disclosures in the future prior to all shareholders meetings.

The first two issues are clearly moot. Plaintiff here does not seek damages; that would have avoided the mootness problem. Browning Debenture Holders' Committee v. DASA Corp., 524 F.2d 811, 816 (2d Cir. 1975). And this court can no longer enjoin the 1974 meeting; it has already been held. A declaration that it is null and void and scheduling a new meeting would be an "empty exercise" DASA, 524 F.2d at 814, since two subsequent shareholders meetings have already been held.

Plaintiff has also requested the prompt disclosure of all material facts relating to FSC's business affairs. More specifically, plaintiff charges that the 1974 proxy statement failed to disclose the following information and that such information continues to remain undisclosed:

(a) information about the unlawfulness of the acquisition in 1971 of a majority of the voting stock of FSC by defendant Equimark Corporation ("Equimark");

(b) substantial abuses of Equimark's control over the business affairs of FSC;

(c) the determination by the Federal Reserve Board that Equimark's acquisition of this stock was unlawful;

(d) facts relating to an action brought against FSC by its former chief executive officer, Marshall E. Gerson;

(e) facts relating to Equimark's determination to discontinue its ownership of FSC stock while representing to the shareholders that it had no such plans; and

(f) facts relating to the adverse financial consequences to FSC should Equimark discontinue its ownership of stock of FSC. 1/

Whether this claim too is moot may also be determined by reference to the DASA case, supra. The court there noted that the Supreme Court in J.I. Case Co. v. Borak, 377 U.S. 426 (1964) first recognized a private cause of action for §14(a) violations, holding that "private §14(a) actions should be authorized when they 'make effective the congressional purpose' of the securities laws" (DASA at 816) (Emphasis added by the Court of Appeals). However, where plaintiff's claim

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1/ See defendant's affidavit in opposition to dismiss; pp. 1-2




will not "effect anything," it must fail. Ibid.

Granting plaintiff's claim for injunctive relief ordering disclosure would not effect anything. Equimark divested itself of FSC stock in April of 1975. For this reason, the issue of the unlawfulness of Equimark's acquisition of FSC stock and claims as to Equimark's exercise of control were held moot (see opinion in this case, signed May 6, 1976). Therefore, while plaintiff contends that the need for disclosure remains important because the withheld information will have a vital effect on the decisions of FSC shareholders (Plaintiff's Memorandum in Opposition to Motion, at 2), it is difficult to see how disclosure of information relating to issues already held moot can have any practical import.

For these reasons, defendant's motion to dismiss on grounds of mootness is granted.

It is SO ORDERED.

Dated: New York, New York  
September 29, 1976

  
\_\_\_\_\_  
ROBERT L. CARTER  
U.S.D.J.

## NOTICE OF APPEAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

RICHARD S. KAYE,

Plaintiff,

74 Civ. 5628 (RLC)

-against-

FUNDING SYSTEMS CORPORATION  
and EQUIMARK CORPORATION,

## NOTICE OF APPEAL

Defendants.

S I R S :

PLEASE TAKE NOTICE that plaintiff Richard S. Kaye hereby appeals to the United States Court of Appeals for the Second Circuit from all of an order of this Court dated September 29, 1976 which granted the motion of defendant Funding Systems Corporation to dismiss the complaint on the grounds of mootness.

Dated: New York, New York  
October 28, 1976

ALEXANDER, KATZ & ROSENBERG

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